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In The

Supreme Court of the United States

October Term, 1997

THE CITY OF RIVERSIDE, CALIFORNIA,

Cross-Petitioner,

vs.

NATIONAL ENVIRONMENTAL WASTE CORPORATION,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Bankruptcy Court erred in holding that the police and regulatory powers exception to the automatic stay codified at 11 U.S.C. § 362(b)(4) (1993) did not apply to actions taken by the City of Riverside with regard to the collection and disposal of solid wastes.

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The City of Riverside (the "City") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re National Environmental Waste Corp., a California Corporation, Debtor; National Environmental Waste Corp., a California corporation, Appellant, v. City of Riverside, a political subdivision of the State of California, Appellee,* and *In re National Environmental Waste Corp., a California Corporation, Debtor; City of Riverside, a political subdivision of the State of California, Appellant v. National Environmental Waste Corp., a California Corporation, Appellee,* 129 F.3d 1052 (9th Cir. 1997) ("*Newco*").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 129 F.3d 1052, and is reprinted in the appendix to Petitioner/Cross-Respondent's petition for writ of certiorari [hereinafter "Pet. App."] at A-1. The opinion of the district court is unreported, and is reprinted at Pet. App. E-1. The opinion of the bankruptcy court is reported at 191 B.R. 832 (C.D. Cal. 1996), and is reprinted at Pet. App. B-1.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its decision and judgment herein on November 10, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 6, 1998, and is reprinted at Pet. App. D-1. Petitioner/Cross-Respondent National Environmental Waste Corp., a California corporation ("Petitioner/Cross-Respondent" or "Newco") filed its petition for writ of certiorari and the petition was placed on the docket on April 7, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993) and Rule 12.5 of the Rules of the

Supreme Court of the United States and is conditional upon this Court's grant of Petitioner/Cross-Respondent's petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are printed in the Appendix hereto and are as follows:

11 U.S.C. § 101(27) (1993)

11 U.S.C. § 101(40) (1993)

11 U.S.C. § 362 (1993)

CAL PUB. RES. CODE § 49300 (West 1996)

CAL PUB. RES. CODE § 49504 (West 1996)

CAL PUB. RES. CODE § 49520 (West 1996)

STATEMENT OF THE CASE

A. Collection Of Solid Waste In The City Of Riverside

As of 1991, the City's geographic boundaries had been divided into five separate and distinct service areas for purposes of solid waste handling services. Excerpts, pp. 18, 250. To service these separate service areas, the City had retained four separate solid waste enterprises pursuant to Cal. Pub. Res. Code § 49300 (West 1996).[1] These enterprises included Tri-Co

1. Under California law:

> "Solid waste enterprise" means any individual, partnership, joint venture, unincorporated private organization, or private corporation regularly engaged in the business of providing solid waste handling services.

CAL. PUB. RES. CODE § 49504 (West 1996).

Disposal, Loma Linda (BFI) Disposal, Marks and National Environmental Waste Corporation ("Newco"). *Id.*

The City's contract with Newco (the "Agreement") was entered on or about January 18, 1991.[2] *Id.* The City's Agreement with Newco and the other solid waste enterprises were commonly referred to as "evergreen" contracts. Excerpts, pp. 19, 250. The term evergreen indicates that the agreements run perpetually until the City provides eight years' notice of termination.[3]

B. The City's Administrative Review And Issuance Of Notices Of Termination With Regard To All Solid Waste Evergreen Contracts

On or about March 11, 1993, the City's Utility Services/ Land Use/Energy Development Committee ("Committee"), at the request of the City Council for the City of Riverside ("City Council"), reviewed the Evergreen contracts between the City and the various solid waste enterprises. Excerpts, pp. 19, 250. The conclusion of the Committee was that the Evergreen contracts did not allow the City to best provide for the health and welfare of its constituents due to the eight-year notice provisions. *Id.*

In so concluding, the Committee found and recommended that "it is simply good public policy to review the contracts periodically to ensure competition, innovation and the best

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2. Although the City has retained Newco's services since 1972, the Debtor's most recent Agreement with the City had been entered on January 18, 1991. Excerpts, pp. 18, 250.

3. *See* Agreement, paragraph 22, which provides that the "City may cancel this contract at its sole option without any obligation to show cause upon providing the Contractor with 8 years notice." Excerpts, pp. 51, 250.

possible service to the City's businesses and residents."[4] The committee's recommendation also stressed that the termination of the evergreen contracts was "not due to poor performance" with regard to the debtor or any other solid waste enterprise.[5]

On or about May 11, 1993, at a regularly conducted public City Council Meeting, the City's Public Works Director answered questions from the City Council and Mayor with regard to the Committee's recommendation. Excerpts, pp. 19-20. Representatives from Newco, BFI Disposal, Tri-Co Disposal, and others spoke with regard to the Committee's recommendation. *Id.* Following lengthy discussion and debate, the City Council approved the recommendation as presented by a vote of six to one.[6] Excerpts, pp. 20, 56, and 250.

On or about May 18, 1993, the City provided notice ("Notice") of its administrative and regulatory decision to terminate all evergreen contracts with solid waste enterprises, including Newco.[7] This decision also implemented the decision of the legislative branch of the State of California to specifically disfavor the granting of "evergreen" contracts to solid waste enterprises. *See* CAL. PUB. RES. CODE § 49520 (West 1996). The Notice specified that "this cancellation is not due to poor performance and does not mean that the contracts cannot be renegotiated prior to May 11, 2001."[8]

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4. *See* City Council Memorandum. Excerpts, p. 57.

5. *Id.*

6. *See* Minutes from May 11, 1993 City Council Meeting. Excerpts, p. 59.

7. Excerpts, pp. 20, 61 and 250-251.

8. *Id.*

C. Newco's Bankruptcy Proceeding

On or about May 4, 1993, Newco filed a voluntary petition under Chapter 11 of Title 11 of the United States Code commencing the within bankruptcy case. Excerpts, p. 250. At the time of commencement of this case, Newco was not in default pursuant to the terms of its Agreement with the City. Excerpts, p. 20. Moreover, the bankruptcy filing was not in any way motivated by the City's pending review of the evergreen contracts. Excerpts, pp. 20, 250.

The City Council's administrative and regulatory decision to provide eight years' notice of termination with regard to the evergreen contracts was not related in any way to an attempt by the City to collect or improve its priority with regard to a prepetition debt owed to it by the Newco. Excerpts, p. 20. The City's Notice explicitly stated that the termination was not due to the Newco's performance and that the contracts could be renegotiated prior to the expiration of the eight-year termination period. Excerpts, pp. 20, 61.

Moreover, the City applied its resolution to terminate the evergreen contracts equally to all solid-waste enterprises in furtherance of its public policy objective of protecting the health and welfare of its citizens. Excerpts, pp. 20, 250-251. The Bankruptcy Court specifically found that the City's review and issuance of the notice of termination was based upon the determination that "the Evergreen contracts did not allow the City to provide for the health and welfare of its constituents in the best possible way due to the eight-year notice provision." Excerpts, p. 250.

Newco failed to challenge the City's postpetition actions until April 10, 1995[9] — *nearly two years after the City provided*

9. Excerpts, pp. 22, 251.

notice to Newco and ten months after confirmation of the Newco's Chapter 11 Plan.[10]

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Should this Court grant the petition for writ of certiorari in this case, it will be called upon to review whether the bankruptcy court abused its discretion in granting the City an annulment of the automatic stay in Newco's bankruptcy case to validate the City's May 18, 1993 Notice of Termination, which gave notice to Newco that its exclusive contract with the City to haul solid waste would terminate in eight years.

Any such decision rests necessarily on the conclusion that the City's action was subject to the automatic stay, rather than expressly excepted from application of the automatic stay as a lawful exercise of the City's police power to regulate the collection and disposal of solid waste pursuant to 11 U.S.C. § 362(b)(4) (1993), (the "Regulatory Exception") and that the bankruptcy court's decision that the automatic stay applied was not an error of law. Such questions should be addressed before reaching the issue of what the correct standard should be for annulment of the automatic stay.

The Bankruptcy Court held that the automatic stay imposed under 11 U.S.C. § 362(a)(3) (1993) preempted the City's ability to exercise its police and regulatory power regarding the collection and disposal of solid waste handling, and that the police and regulatory power exception provided pursuant to 11 U.S.C. § 362(b)(4) (1993) did not apply.[11] Both the District

10. The Court confirmed Newco's First Amended Joint Plan Of Reorganization (the "Plan") on June 22, 1994. Excerpts, p. 260.

11. Although the Bankruptcy Court held that the police and regulatory powers exception to the automatic stay did not apply to the (Cont'd)

Court, sitting as an appellate court pursuant to 28 U.S.C. § 158(a) (1993), and the Ninth Circuit Court of Appeals dismissed the City's cross-appeal of the Bankruptcy Court's decision as moot, as they both affirmed the Bankruptcy Court's determination to annul the automatic stay on other grounds. (Pet. App. at A-1 and E-1)

The Bankruptcy Court's decision, based upon its interpretation of the Ninth Circuit's opinion in *Hillis Motors, Inc. v. Hawaii Auto Dealers Association*, 997 F.2d 581 (9th Cir. 1993), reflects an overly restrictive view of the Regulatory Exception, which conflicts with the application of other Courts of Appeal, and which, if allowed to stand, will allow the use of a bankruptcy filing to frustrate governmental actions designed to facilitate the public welfare, including regulation of illegal dumping of toxic wastes or labor disputes, merely because the police or regulatory action may constitute an exercise of an act to exercise control over property of the estate.

As many Courts of Appeal have recognized, the exercise of police and regulatory powers necessarily involves asserting some control over property of the estate, and the Regulatory Exception has routinely been applied even though property of the estate is impacted. The application of the police and regulatory powers exception must rest on a determination of whether the City's action advanced public policy and the protection of the health and welfare of its citizens rather than its own pecuniary interest.

(Cont'd)
City's actions, the Court nonetheless annulled the stay based upon Newco's laches and delay in challenging the effectiveness of the City's postpetition termination of the Newco's contract. Excerpts, pp. 257-260, 265-266. *See also In re National Environmental Waste Corporation*, 191 B.R. 832 (Bankr. C.D. Cal. 1996).

A split exists among the circuit courts as to the proper test for determining whether or not the police and Regulatory Exception applies where the action of the municipal agency affects property of the estate. As such, this conditional cross-petition for writ of certiorari should be granted.

ARGUMENT

11 U.S.C. § 362(b)(4) (1993) Operates As An Exception To The Automatic Stay Allowing A City To Exercise Its Police And Regulatory Powers.

The filing of a petition under Title 11 of the United States Code generally acts as a stay against all actions taken by creditors to recover a claim from a debtor.

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1).

The automatic stay, however, does not operate as a stay with regard to proceedings by a governmental unit to enforce its regulatory powers.

> The filing of a petition . . . does not operate as a stay . . . under subsection (a)(1) of this section, of

> the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4).

There is no dispute that the City is a "governmental unit" whose actions may be excepted from the automatic stay.[12] The Bankruptcy Court was presented with the issue of whether the City Council's administrative proceeding and vote to provide eight years' notice of termination constituted the "enforcement" of the City's "police or regulatory power."

The Bankruptcy Court held that the administrative review and notice by the City amounted to an invalid exercise of control over property of the estate, which was prohibited by 11 U.S.C. § 362(a)(3) as "an act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," 11 U.S.C. § 362(a)(3), which it found was not subject to the police or regulatory powers' exception.

I.

THE COURTS OF APPEAL ARE SPLIT AS TO WHETHER THE POLICE AND REGULATORY POWERS EXCEPTION TO THE AUTOMATIC STAY APPLIES TO ACTS WHICH AFFECT PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE.

A clear split of authority exists among the Courts of Appeal, as well as among the bankruptcy courts, as to whether the Regulatory Exception applies when the act necessarily impacts property of the estate.

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12. 11 U.S.C. § 101(27) defines a "governmental unit" to include a "municipality." 11 U.S.C. § 101(40) defines a "municipality" to include a "political subdivision" or "instrumentality of a state."

A. Application Of The Police Powers And Regulatory Exception By The Bankruptcy Court.

The Bankruptcy Court held that by providing Newco with eight years' notice of termination of its evergreen contract, the City exercised "control" over property of the estate; thereby invoking the automatic stay imposed by 11 U.S.C. § 362(a)(3) (1993). The Bankruptcy Court further held that the police power and regulatory exceptions to the automatic stay did not apply to acts taken in violation of 11 U.S.C. § 362(a)(3) (1993).

B. The Ninth Circuit Has Not Applied The Regulatory Exception Where An Act Results In An Exercise Of Control Over A Property Of A Debtor's Estate.

The decisions of the Ninth Circuit Court of Appeals have rejected application of the Regulatory Exception when the actions by the regulating agency would necessarily remove property from the bankruptcy estate finding that the exception does not apply to actions taken in contravention of 11 U.S.C. § 362(a)(3) (1993).

In *Hillis Motors, Inc. v. Hawaii Auto Dealers Association*, the Ninth Circuit found that "[T]here is no governmental powers exception to section 362(a)(3)." *Supra* at 591. The Bankruptcy Court specifically relied on *Hillis Motors, Inc. v. Hawaii Auto Dealers Association* in determining that relief from the stay is necessary for the exercise of governmental powers which incidentally exercise control over property of the estate.

The facts in *Hillis Motors, Inc. v. Hawaii Auto Dealers Association*, however, are distinguishable from the case at bar. In *Hillis Motors, Inc. v. Hawaii Auto Dealers*, the State of Hawaii sought involuntary dissolution of the corporate debtor. By operation of law, title to the debtor's property transferred to its

individual shareholders upon dissolution of the debtor. The Ninth Circuit held that the involuntary dissolution effectuated a removal of property from the jurisdiction of the bankruptcy court to the shareholders resulting in the impermissible exercise of "control" over property of the estate.

Unlike the facts present in *Hillis Motors, Inc. v. Hawaii Auto Dealers Association*, in the case at bar the City's issuance of eight years' notice did not deprive the Bankruptcy Court of jurisdiction over the Agreement. To the contrary, even after notice was given to Newco, it was free to assume, assign, or reject its interest under the Agreement. As such, the City did not exercise the type of control necessary to trigger the application of 11 U.S.C. § 362(a)(3) (1993).

This conclusion is supported by the Legislative History to 11 U.S.C. § 362(a)(3) (1993) which indicates that "control" refers to the repossessing or taking physical possession of property of the estate.

> The purpose of this provision is to prevent dismemberment of the estate. Liquidation must proceed in an orderly fashion. Any distribution of property must be by the trustee after he has had an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution.

H.R. 95-595, 95th Cong., 1st Sess. (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 49-51 (1978).

Additionally, due to the eight-years' notice provision, any purported effect on the Newco's control over property of the estate was non-existent or *de minimis*. This situation is analogous to the permissible entry of a postpetition judgment by a

governmental entity under 11 U.S.C. § 362(b)(5) (1993). Because the City did not attempt to withhold payment otherwise owed to the Newco in this case or attempt to transfer title to property of the estate, the City did not exercise "control" over property of the estate.

In general, the courts in the Ninth Circuit have refused to extend an overly broad definition to the word "control" as used in 11 U.S.C. § 362(a)(3) (1993). Thus, the police and regulatory powers exception was found applicable in the following cases notwithstanding any apparent "control" over property of the estate. *See In re Poule*, 91 B.R. 83 (Bankr. 9th Cir. 1988) [actions taken by California Registrar of Contractors to revoke the debtor's contractors' license]; *In re Security Gas & Oil, Inc.*, 70 B.R. 786 (Bankr. N.D. Cal. 1987) [actions taken by state to terminate a debtor's right to operate oil and gas leases].

In addition, a lower court in the Ninth Circuit has held that the mere fact that a debtor may have to pay money as a result of a proper police power proceeding does not convert the exercise of the police or regulatory power into an act to control property of the estate.

> [A]n action to require a debtor to clean up an environmental hazard does not become an action to enforce a money judgment merely because the debtor will be required to expend money to comply with the court's order.

Security Gas at 790.

Virtually every police power available to a governmental unit could be construed as the exercise of control over property of the estate. In the recently decided matter of *In re Universal Life Church, Inc.*, 128 F.3d 1294 (9th Cir. 1997), the Ninth Circuit Court of Appeals addressed this point,

> "Indeed, most governmental actions which fall under this exemption [referring to 11 U.S.C. §362(b)(4)] have some pecuniary component, . . . This does not abrogate their police power function. Only if the action is pursued 'solely to advance a pecuniary interest of the governmental unit' will the automatic stay bar it." *Id.* at 1299, citing *Thomassen v. Division of Med. Quality Assurance (In re Thomassen)*, 15 B.R. 907, 909 (Bankr., 9th Cir. BAP 1981).

Accordingly, in the *In re Universal Life Church, Inc.* decision, the Ninth Circuit recognized that where an action taken under 11 U.S.C. § 362(a)(1) (1993) impacts property of the estate, the Regulatory Exception still applies. However, the *In re Universal Life Church, Inc.* case did not specifically address the application of the Regulatory Exception to 11 U.S.C. § 362(a)(3) (1993).

C. The First, Sixth and Tenth Circuits Specifically Apply The Regulatory Powers Exception To Actions Otherwise Stayed By 11 U.S.C. § 362(a)(3) (1993).

The First, Sixth and Tenth Circuits have explicitly rejected the narrow application of the police and regulatory powers exception adopted by the Bankruptcy Court in this matter, in reliance on Ninth Circuit authority. These courts further recognized the struggle inherent in the statutory construction of 11 U.S.C. § 362 (1993).

> "Courts have struggled, in particular, to reconcile the fact that governmental police or regulatory power is clearly exempted from the stay imposed by (a)(1), but not clearly exempted from the stay imposed by (a)(3), despite the fact that comparable governmental administrative action might be involved." *Yellow Cab Cooperative Association v. Metro Taxi, Inc. (In re Yellow Cab Cooperative Association)*, 132 F.3d 591, 598 (10th Cir. 1997).

In accord with the reasoning of this Court in *Citizens Bank of Maryland v. Strumpf*, 116 S.Ct. 286 (1995), these courts have adopted the position that 11 U.S.C. § 362(a)(3) (1993) should not be interpreted in a manner that would proscribe what another section of the Bankruptcy Code was plainly intended to permit.

The First Circuit in *Cournoyer v. Town of Lincoln*, 790 F.2d 971 (1st Cir. 1986), *aff'g*, 53 B.R. 478 (D. R.I. 1985) rejected the debtor's contention that a municipality's removal and sale of used truck parts in the debtor's salvage yard, pursuant to certain zoning ordinances, constituted acts to obtain possession and control of property of the estate in violation of 11 U.S.C. § 362(a)(3) (1993).

> [S]uch a characterization is inappropriate, and has been rejected, because of the justification underlying the governmental action . . . [T]he sole motivation for the official action . . . is to stop the debtor from operating a business in violation of state or local law.

Cournoyer at 483.

The Sixth Circuit Court of Appeals more specifically recognized the Regulatory Exception's application to acts taken in the exercise of a municipal agency's regulatory power, which incidentally result in an exercise of control over a debtor's property in contradiction to 11 U.S.C. § 362(a)(3) (1993).

In the case of *Javens v. City of Hazel Park and City Of Royal Oak, (In re: Harry Javens)*, 107 F.3d 359 (6th Cir. 1997), the Sixth Circuit Court of Appeals specifically rejected a debtor's claim that a city's demolition order, which necessarily exerted control, and destruction, of property of the debtor's estate was not excepted from the automatic stay by 11 U.S.C. § 362(b)(4) (1993).

In support of its argument, the *Javens v. City of Hazel Park and City of Royal Oak* court cited this Court's opinion in *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), and reasoned that "[m]any actions against a debtor taken under governmental police or regulatory power have the effect of controlling the property of the estate." *Supra* at 367. The *Javens v. City of Hazel Park and City of Royal Oak* court further reasoned that a logical intersection exists between the category of an "act . . . to exercise control over property of the estate" and the category of an "action or proceeding . . . to enforce [a] governmental unit's police or regulatory power," which allowed for the Regulatory Exception to apply despite the concurrent and incidental exercise of control over property of a debtor's bankruptcy estate. *Id.*

Moreover, the *Javens v. City of Hazel Park and City of Royal Oak* court addresses, and, dismisses the analysis used by the Ninth Circuit Court of Appeals in *Hillis Motors, Inc. v. Hawaii Auto Dealers Association*, *supra* as "fraught with difficulty." *Javens*, 107 F.3d at 370. It noted that the *Hillis Motors, Inc. v. Hawaii Auto Dealers Association* court failed "to account for actions that are undoubtedly exercises of police or regulatory power and that also, in some way, conflict with the control of the property of the estate by the bankruptcy court." *Id.*

The Sixth Circuit Court of Appeals instead adopts the well-reasoned analysis of the bankruptcy court in *In re Beker Industries*, 57 B.R. 611, 627 (Bankr. S.D. N.Y. 1986)[13], in stating as follows "the universe of actions that trigger an

13. The *Beker Industries* court rejected a debtor's argument that the Florida Land and Water Adjudicatory Commission's administrative proceedings restricting the debtor's ability to ship phosphate from its mine to its refineries was an impermissible exercise of control over the debtor's property.

automatic stay under § 362(a)(3) does not include those governmental actions entitled under § 362(b)(4), to an exception from an automatic stay." *Javens*, 502 at 369.

The Tenth Circuit likewise has resolved the inconsistencies in the statute "with those courts which have held that the governmental regulatory or police power exception of §362(b)(4) applies to actions stayed under §362(a)(3)" *Yellow Cab Cooperative Association v. Metro Taxi, Inc.*, 132 F.3d at 598.

The facts in *Yellow Cab Cooperative Association v. Metro Taxi, Inc.* are analogous to the facts in the case at bar. In *Yellow Cab Cooperative Association v. Metro Taxi, Inc.*, a public utilities commission, acting in the public interest, limited the effectiveness of a previously issued operating certificate to purchaser of debtor's assets, which resulted in a diminution in the number of taxis to be operated by the purchaser. In the case at bar, the City, acting in the public interest, issued an eight-year termination notice to all solid waste haulers, including Newco. The City exercised its regulatory power in the public interest, and not solely for pecuniary gain, resulting in no (or a de minimis) impact on the property of the estate.

In sum, the First, Sixth and Tenth Courts, unlike the Ninth Circuit, have universally applied the governmental regulatory or police power exception of 11 U.S.C. § 362(b)(4) (1993) to actions stayed under 11 U.S.C. § 362(a)(3) (1993), so that the statutes operate in concert rather than in opposition.

II.

INTERVENTION BY THIS COURT IS NECESSARY TO RESOLVE THIS SPLIT OF AUTHORITY.

As demonstrated above, there exists a clear split of authority regarding whether the Regulatory Exception of 11 U.S.C. § 362(b)(4) (1993) applies when the action results in an incidental control over property of a debtor's estate in contradiction to 11 U.S.C. § 362(a)(3) (1993). The Ninth Circuit's position on this matter is inconsistent with the rulings of the other circuits. Had the Bankruptcy Court applied the standards of the First, Sixth or Tenth Circuits, its decision with respect to application of the Regulatory Exception would necessarily have been different.

CONCLUSION

Should this Court grant the petition for writ of certiorari, which requires the Court to determine whether the bankruptcy court abused its discretion in annulling the automatic stay to validate the City's eight-year notice of termination of Newco's contract with the City for solid waste handling, it must necessarily determine whether the authority of a state, or political subdivision of a state, to exercise its police and regulatory power with respect to disposal of solid waste is specifically excepted from the automatic stay. This is an important question of bankruptcy law with national implications where the marked split among the courts of appeals is in need of correction.

Respectfully submitted,

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APPENDIX A — 11 U.S.C. § 101 (27) & (40)

CHAPTER 1

General Provisions

SECTION 101 (11 U.S.C. § 101)

* * *

(27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

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(40) "municipality" means political subdivision or public agency or instrumentality of a State;

APPENDIX B — 11 U.S.C. § 362

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

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(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of criminal action or proceeding against the debtor;

(2) under subsection (a) of this section —

(A) of the commencement or continuation of an action or proceeding for —

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding bar a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment as defined in section 101, 741 or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant,

stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) * under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the

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* [(*Ed. Note:* Paragraphs (12) and (13) were added to 11 U.S.C § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1980. Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L, No. 99-509 provides:

> the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986.

(Cont'd)

commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) ** under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of

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(Cont'd)

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended, then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.]

** [(Ed. Note: Paragraphs (12) and (13) were added to 11 U.S.C. § 362 by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L No. 99-509 (1986). Section 5001 of Pub. L. No. 99-509 provides;

> the amendments made by subsection (a) of this section shall apply only to petitions nled under section 362 of this title 11 United States Code. which are made after August 1, 1886.

(Cont'd)

the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(a) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate programs authorized under such Act;

(Cont'd)

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.)]

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this sector continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed;

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12 or 13 of this title, the time a discharge is granted or denied.

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(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest,

(2) with respect to a stay of an act against property under subsection (a) of this section, if

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court; may determine for cause by order entered within that 90-day period) —

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments

are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request unless the court, after notice and a hearing orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary heading, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

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(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages.

APPENDIX C — CALIFORNIA PUBLIC RESOURCES CODE, § 49300

Section

49300. Power to contract.

§ 49300. Power to contract

The legislative body of any incorporated city may contract for the collection of disposal, or both, of garbage, waste, refuse, rubbish, offal, trimmings, or other refuse matter under the terms and conditions that are prescribed by the legislative body of the city by resolution or ordinance.

(Added by Stats. 1989, c. 1095, § 22.)

APPENDIX D — CALIFORNIA PUBLIC RESOURCES CODE, § 49504

§ 49504. Solid waste enterprise

"Solid waste enterprise" means any individual, partnership, joint venture, unincoporated private organization, or private corporation regularly engaged in the business of providing solid waste handling services.

(Added by Stats. 1989, c. 1095, § 22.)

APPENDIX E — CALIFORNIA PUBLIC RESOURCES CODE, § 49520

§ 49520. Continuation of service; exclusive franchise

If a local agency has authorized, by franchise, contract, license, or permit, a solid waste enterprise to provide solid waste handling services and those services have been provided for more than three previous years, the solid waste enterprise may continue to provide those services up to five years after mailed notification to the solid waste enterprise by the local agency having jurisdiction that exclusive solid waste handling services are to be provided or authorized, unless the solid waste enterprise has an exclusive franchise or contract.

If the solid waste enterprise has an exclusive franchise or contract, the solid waste enterprise shall continue to provide those services and shall be limited to the unexpired term of the contract or franchise or five years, whichever is less.

(Added by Stats. 1989, c. 1095, § 22.)